Supreme Court, U.S.
FILED

No. 971656 APR 8 1998

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

LINDA SLOAN,

Petitioner,

vs.

JOHN SHARP, Comptroller, in his capacity as head of Comptroller of Public Accounts for the State of Texas and STATE OF TEXAS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

PATRICK J. GILPIN
Counsel of Record
PATRICK J. GILPIN
& ASSOCIATES
Attorneys for Petitioner
4001 North Shepherd
Suite 103
Houston, Texas 77018
(713) 691-6908

145724

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

40 pp

QUESTIONS PRESENTED

1. Is the employee in a Title VII hostile work environment case entitled to a jury instruction that the employer is liable for the sexual harassment acts of its supervisor if the supervisor was entrusted with the position of responsibility for supervising the employee?

2. Is the employee in a Title VII *quid pro quo* sexual harassment case entitled to a jury instruction that the employer is absolutely responsible for the sexual harassment of a supervisor who has the power to make employment decisions concerning the employee's discipline, promotion, performance evaluation or termination?

3. When the trial judge refused to give the requested jury instruction as referred to in paragraph No. 1 above and the employee made timely objection under Fed. R. Civ. P. 51, did the trial court and the Circuit Court commit reversible error in denying the employee the requested jury instruction?

4. When the trial judge refused to give requested jury instruction as referred to in paragraph No. 2 above and the employee made timely objection under Fed. R. Civ. P. 51, did the trial court and the Circuit Court commit reversible error in denying the employee the requested jury instruction?

PARTIES TO THE PROCEEDINGS

In addition to the parties set forth in the caption of the case in this Court, one other party not a part of the petition for writ of certiorari is Grundy Wiley.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Proceedings Below	6
In Denying Sloan's Requested Jury Instructions, The Trial Court Failed To Instruct Jurors Fully, Clearly And Correctly On Applicable Law.	8
Discussion Of Applicable Law: Fifth Circuit	9
Discussion Of The Law: Other Courts	11
Reasons for Granting the Writ	13
I. This Court Should Grant Certiorari To Remedy A Split In The Circuits Created By The Opinion Below.	13

Contents

Page

II. This Court Should Grant Certiorari To Clarify The Intent Of Congress. 14

III. This Court Should Grant Certiorari During The Pendency Of Faragher In The Interest Of Manifest Justice. 14

Conclusion 15

TABLE OF CITATIONS

Cases Cited:

Bender v. Brumley, 994 F.2d 1151 (5th Cir. 1993) ... 8

Faragher v. City of Boca Raton, Ill., F.3d 1530 (11th Cir. 1997) (en banc), *cert.* at __ U.S. __, 139 L. Ed. 2d 337, 118 S. Ct. 438 (1997) 11, 13, 15

Garcia v. Elf Atochem North America, 28 F.3d 446 (5th Cir. 1994) 8

Gebser v. Lago Vista Independent School District, 106 F.3d 1223 (5th Cir. 1997) 15

Grant v. Lone Star Co., 21 F.3d 649 (5th Cir.) *cert. denied* 513 U.S. 1015 (1994) 8

Hamilton v. Rodgers, 791 F.2d 439 (5th Cir. 1986) .. 10, 13

Contents

Page

Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997), *pet. for cert.* filed 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997) 11, 13, 14, 15

Horton v. Buhrke, A Division of Klein Tools, Inc., 926 F.2d 456 (5th Cir. 1991) 8

Jett v. Dallas Indept. School District, 798 F.2d 748 (5th Cir. 1986) 9, 10, 13

Jones v. Flagship International, 793 F.2d 714 (5th Cir. 1986), *cert. denied* 107 S.Ct. 952 (1986) 9

Karibian v. Columbia University, 14 F.3d 773 (2nd Cir. 1994) 12, 13

Kimbro v. Arlantic Richfield Co., 889 F.2d 869 (9th Cir. 1989), *cert. denied* 498 U.S. 814 (1960) 11, 13

Lowrey v. Texas A&M System, 117 F.3d 242 (5th Cir. 1997) 9

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) 14

Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927 (5th Cir. 1996) 10

Statutes Cited:

42 U.S.C. § 1981 10

Contents

Page

42 U.S.C. § 1983 10

42 U.S.C. § 2000e *et seq.* 9

42 U.S.C. § 2000e(b) 2, 14, 15

United States Constitution Cited:

Eleventh Amendment 10

Rule Cited:

Fed. R. Civ. P. 51 ..... i, 2, 6

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Fifth Circuit Filed January 8, 1998 ..... 1a

Appendix B — Final Judgment of the United States District Court for the Southern District of Texas, Houston Division Filed November 21, 1996 ..... 10a

Appendix C — Order of the United States Court of Appeals for the Fifth Circuit Denying Petition for Rehearing Filed February 12, 1998 ..... 13a

Appendix D — Excepts from Parties' Proposed Jury Instructions in the United States District Court for the Southern District of Texas, Houston Division Filed November 12, 1996 ..... 15a

IN THE
Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioner Linda Sloan ("Sloan") respectfully requests that a writ of certiorari be issued in this case to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is found in Appendix A. The unpublished opinion of the district court of the Southern District of Texas, Houston Division, is found in Appendix B.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit ("Court of Appeals") was entered January 8, 1998. The Court of Appeals granted Sloan's motion to file a petition for rehearing out of time on February 12, 1998. (Appendix C.) The Court of Appeals denied Sloan's petition for rehearing on February 12, 1998. (Appendix C.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 51 of Title 28 provides in its relevant parts:

Rule 51. Instructions to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

42 U.S.C. § 2000e(b) provides in its relevant parts:

§ 2000e. Definitions

For the purposes of this subchapter—

. . . . .

(b) The term "employer" means a person engaged in an industry affecting commerce who

has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

STATEMENT OF THE CASE

The fundamental question in this case is whether the employer is liable for the sexual harassment acts of its highest ranking on site management employee, Grundy Wiley ("Wiley"). Wiley, the manager at the Houston–Southwest office where Sloan worked, had a duty under management rules to report sexual harassment to upper management. The record is replete with testimony claiming Wiley, who is male, sexually harassed Sloan and other female employees. Wiley never reported such sexual harassment.

Sloan testified of the repeated sexual harassment of her by her supervisor, Wiley. According to Sloan's testimony, while in the field with Wiley, he placed his hands in a sexual manner on Sloan's upper leg. Tr. 176. Sloan testified that Wiley called Sloan late at night at her home and on one occasion came to her house uninvited. Tr. 164-165. Sloan's testified that she reported to Wiley that co-workers were speculating whether Sloan could reach a sexual climax, that Sloan was inappropriately sexually touches by co-worker Ed Herron, and that co-worker Jodie Moore asked Sloan when Sloan gave him change why she put "pubic hairs" in the change. Tr. 91, 238-239, 241, 244. The record is clear that except for giving Jodie Moore an oral reprimand, Wiley neither reported sexual harassment to upper management nor did he discipline any employee under him.

Sloan's testimony was buttressed by her co-worker's testimony, especially the testimony of Joyce Coleman ("Coleman") and Dyveonna Craddock Carolina ("Carolina"). Coleman testified that Wiley called Sloan into Wiley's office more than other employees. Tr. 106. Further, Coleman testified that Wiley made extensive visits to Sloan's desk. Tr. 105-106. Shepherd testified that Wiley would walk into Sloan's office with no shoes. Tr. 81. Like Coleman, Carolina also testified that Wiley would sit on Sloan's desk with no shoes. Tr. 51. Sloan testified that on one occasion Wiley, who was wearing no shoes, called Sloan into Wiley's office, closed the door, pulled his chair close to Sloan's chair and placed his feet on top of Sloan's feet in a sexual manner. Tr. 171-172. On this occasion

before Wiley could go further, he was interrupted by a knock on the closed door. *Id.* On another occasion, Wiley came into Sloan's office wearing no shoes. Tr. 173. Wiley pulled a chair up next to Sloan. *Id.* Soon Sloan felt Wiley's stocking feet on the top of Sloan's feet. *Id.* Sloan advised Wiley Sloan did not like what he was doing. *Id.* Sloan testified that several times Wiley would come by Sloan's desk, lean on the desk and put Wiley's shoeless feet on top of Sloan's feet. Tr. 164, 170. Sloan testified that while at her desk, Wiley would ask her personal questions and ask her what kind of perfume she was wearing. Tr. 162-173. Sloan and her co-workers testified that Wiley continuously bothered Sloan at Sloan's desk. Carolina testified that frequently Wiley would sit on top of Sloan's desk real close to Sloan, and according to Carolina, Sloan would begin crying. Tr. 52.

Carolina, Sloan's fellow employee, testified that Carolina suffered sexual harassment at the hand of Wiley. Carolina testified that at one time, Wiley approached Carolina's desk with his pants unzipped and no shoes. Tr. 47. Carolina testified that she was shocked, but Wiley eventually left her desk. Tr. 48. On another occasion, Wiley called Carolina into his office. *Id.* Carolina testified that this time: "he got close to me and said, 'I just wanted you to know I can see your breast.'" Tr. 48. Carolina testified when Wiley discussed her breasts, Carolina was wearing a shirt buttoned up and a jacket suit. *Id.* Further, Carolina testified that "there's no way he could see my breast unless he had x-ray vision." Tr. 49.

The trial record is replete with testimony supporting Sloan's claim of a sexually hostile work environment. On Wiley's birthday, an erotic dancer or stripper performed at the birthday party. Fern Francis ("Francis"), Sloan's supervisor at the time, summoned Sloan and other employees to the office used as a party room. Tr. 50-51, 168, 542. Sloan testified the stripper was down to her G-string with the top of her breast covered when Francis finally turned the music off. Tr. 169-170. In contrast to Sloan, Eicke, one of the supervisors, testified that once the stripper began to take off her clothes, the performance was stopped. Tr. 140. No one disputes the presence of a stripper in the work place.

PROCEEDINGS BELOW

As required under Fed. R. Civ. P. 51, Sloan made a timely objection to the jury charge prior to the jury retiring to consider its verdict. Tr. 564-565. As to Sloan's claim under the theory of *quid pro quo*, Sloan requested the following instruction:

> The Court instructs you that respondeat superior in the context of this case means that the State of Texas is absolutely responsible for the acts of a supervisor who has the power to make employment decisions concerning the employee's discipline, promotion, performance evaluations, or termination. (App. D.)

As to Sloan's claim under the theory of sexually hostile work environment, Sloan requested the following instruction:

> Sexually discriminatory verbal intimidation, ridicule and insult may be insufficiently severe or pervasive to alter the conditions of the victim's employment so as to create a sexually hostile work environment.
>
> Under the legal theory that Defendant State of Texas subjected Plaintiff to a sexually hostile work environment, the State of Texas is liable for the sexual harassment acts of its supervisors if the supervisor was entrusted with the position of responsibility of supervising the employee. (App. D.)

The trial court denied both of Sloan's requested jury instructions. Tr. 564-565. When the jury found against Sloan, she appealed timely. (App. B.) Docket Entry 173, filed 2/14/97. The Circuit Court denied Sloan's appeal, therein affirming the district court. Thereafter, Sloan filed timely this petition for writ of certiorari.

IN DENYING SLOAN'S REQUESTED JURY INSTRUCTIONS, THE TRIAL COURT FAILED TO INSTRUCT JURORS FULLY, CLEARLY AND CORRECTLY ON APPLICABLE LAW

The trial court must instruct jurors fully, clearly and correctly on applicable law. *Bender v. Brumley*, 994 F.2d 1151, 1157 (5th Cir. 1993); *Horton v. Buhrke, A Division of Klein Tools, Inc.*, 926 F.2d 456, 460 (5th Cir. 1991). All circuits who have addressed the question of whether Title VII allows an employee to bring claims against supervisors in their individual capacities have held such claims are not actionable. See, for example, *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451 n.2 (5th Cir. 1994); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir.) *cert. denied* 513 U.S. 1015 (1994).

The trial court denied Sloan's timely requested instruction asking the trial court to instruct the jury that the employer[1] was liable for Wiley's sexual harassment and Wiley's failure to report sexual harassment to the employer. Sloan contends that because Wiley was under an obligation to report sexual harassment to upper management, once Wiley had knowledge of sexual harassment, even if Wiley

---

[1]The defendant in trial court, appellee in circuit court, and respondent in this court is identified in the record as State of Texas, Comptroller of Public Accounts for the State of Texas, and John Sharp in his official capacity as Comptroller, State of Texas, and collectively referred to as "the Comptroller." The respondent is referred to in this petition as the "employer."

was the harasser, Wiley's knowledge was imputed to the employer. To find otherwise would immunize an employer from liability while denying the employee a remedy for unlawful and impermissible activity.

Absent a jury instruction as to vicarious liability, the jury did not understand or may to have understood that if it believed the testimony of Sloan and other witnesses with regard to Wiley's sexual harassment and Wiley's failure to report sexual harassment to upper management, the employer was liable for sexual harassment under Title VII unless the employer took prompt remedial action. *Jones v. Flagship International*, 793 F.2d 714, 719-20 (5th Cir. 1986), *cert. denied* 107 S.Ct. 952 (1986). In other words, for purposes of liability Wiley was the employer.

DISCUSSION OF APPLICABLE LAW: FIFTH CIRCUIT

In affirming the trial court, it appears that the Circuit Court in the unpublished opinion violated its own rules by overturning a published opinion by another panel. *Lowrey v. Texas A&M System*, 117 F.3d 242. 247 (5th Cir. 1997).

The Fifth Circuit has held that Congress: "impose[d] vicarious liability on an employer for its employee's unlawful discrimination when it enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.* Thus, a municipality may be found liable based on *respondeat superior* under Title VII." *Jett v. Dallas Indept. School District*, 798 F.2d 748, 762 n.13 (5th Cir. 1986),

citing *Hamilton v. Rodgers*, 791 F.2d 439, 444 (5th Cir. 1986). In *Jett*, an employment discrimination case under 42 U.S.C. §§ 1981 and 1983 denying liability against the defendant school board based on Eleventh Amendment immunity, the court noted that Title VII overrides Eleventh Amendment immunity. *Hamilton* was an employee discrimination case involving a racially hostile work environment. The employee's first line supervisors participated in and acquiesced in the racial discrimination. This circuit found vicarious liability on the part of the employer "for the discriminatory acts of its supervisory personnel." *Hamilton, supra.*, 444. This circuit noted with regard to the supervisors: "[H]aving entrusted positions of responsibility to ... [the supervisors], the ... [employer] may properly be held accountable for the abuse of their authority." *Id.*

Again in *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996), the Fifth Circuit reaffirmed the principle that: "[A]gency principles apply to section 1981 (and to Title VII) to hold an employer liable for those intentional wrongs of his employees that are committed in furtherance of the employer...." *Id.* [*Patterson* was an employee discrimination hostile environment case where racial slurs were used by the supervisor and because of the supervisor, employees were actually terminated or constructively terminated.]

DISCUSSION OF THE LAW: OTHER COURTS

The Tenth Circuit in *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), *pet. for cert.* filed 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997), establishes four bases for vicarious liability under Title VII, to-wit: (1) the supervisor committed harassment while acting in the scope of employment; (2) the employer knew or should have known about the harassment and failed to respond in a reasonable manner; (3) the employer manifested in the supervisor the authority to act on its behalf resulting in harm to the employee, and the employee relied on the apparent authority; and (4) the employee delegated authority to the supervisor to control the employee's work environment, and the supervisor abused such delegated authority in perpetrating sexual harassment. at 1446. In *Harrison* the Tenth Circuit found that failure to give an instruction on employer liability was error prejudicing the employee, and insofar as the Court instructed the jury as to agency, the instruction was erroneous.

Faragher v. City of Boca Raton, Ill., F.3d 1530 (11th Cir. 1997) (en banc), *cert.* at _U.S. _, 139 L.Ed.2d 337, 118 S.Ct. 438 (1997), involves the issue of vicarious liability. In *Faragher* the Eleventh Circuit held that the City was not liable for the harassment of female lifeguards by their supervisor because the lifeguards' only internal complaint was to another supervisor who did not outrank the harassers and who was considered a friend, and because the plaintiffs worked at an isolated location.

In *Kimbro v. Arlantic Richfield Co.*, 889 F.2d 869, 876-877 (9th Cir. 1989), *cert. denied* 498 U.S. 814 (1960), a case

under the Americans with Disabilities Act ("ADA"), the Ninth Circuit held that the employer was bound by the knowledge of the employee's immediate supervisor that plaintiff's frequent absences from work were due to his cluster migraine condition although the supervisor failed in his duty to report the plaintiff's condition, thus rendering the defendant liable for any failure to make a reasonable accommodation under Washington's disability discrimination law.

In *Karibian v. Columbia University*, 14 F.3d 773, 780 (2nd Cir. 1994), the Second Circuit held that in all *quid pro quo* and many hostile work environment cases of sexual harassment, the employer is liable under the theory of agency. at 780. The Second Circuit held: "an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship. *Id.* In *Karibian* the hostile work environment claim alleged that the supervisor "capitalized upon his authority over her employment to force her to endure a prolonged, violent and demeaning sexual relationship." *Id.* In reversing the district court's summary judgment, the Second Circuit held that the facts as alleged in *Karibian*, if true, made the employer liable under agency law. *Id.*

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO REMEDY A SPLIT IN THE CIRCUITS CREATED BY THE OPINION BELOW.

In one form or another, the Second, Ninth and Tenth Circuits upheld the employee's claim of vicarious liability against the employer in Title VII or ADA cases based on violations of the Acts by the supervisor or violations of the Acts not reported by the supervisor. *Karibian, supra.; Kimbro, supra.; Harrison, supra.* In published opinions prior to its January 8, 1998, opinion, the Fifth Circuit has held that the employer is vicariously liable for Title VII violations by the employee's immediate supervisor. *Jett, supra.; Hamilton, supra.*

In addition to the Fifth Circuit in the instant case, the Eleventh Circuit in *Faragher, supra.* has held that vicarious liability does not attach for sexual harassment by an immediate supervisor. *Faragher, supra.*

Sloan respectfully urges this Court to reconcile the differing Circuit opinions.

II.

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE INTENT OF CONGRESS.

Title VII at 42 U.S.C. § 2000e-(b) defines the term "employer" as including any "agent" of an employer. In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986), this Court held that employers are not automatically liable for sexual harassment by their supervisors, that "absence of notice to an employer does not necessarily insulate that employer from liability," and that "Congress wanted courts to look to agency principles for guidance in this area." At the same time, the Court cautioned that "such common-law principles may not be transferable in all their particulars to Title VII."

Sloan respectfully urges this Court to clarify Congress's intent and the law as to the application of the law of agency *vis-a-vis* Title VII.

III.

THIS COURT SHOULD GRANT CERTIORARI DURING THE PENDENCY OF FARAGHER IN THE INTEREST OF MANIFEST JUSTICE.

On August 6, 1997, petition for certiorari was filed in *Harrison*. On March 25, 1998, this Court heard oral

argument on *Faragher*.[1] The instant case is controlled by this Court's rulings in *Faragher* and, if heard, *Harrison*.

This Court should grant certiorari or remand this case back to the Circuit with orders to stay this case pending the ruling on *Faragher* and, if applicable, *Harrison*. Manifest justice demands the Court so act.

CONCLUSION

Sloan prays that this Court grant her petition for writ of certiorari for the following reasons: 1) to reconcile conflicting circuit opinions as to the issue of vicarious liabiiity for the employer under Title VII; 2) to clarify congressional intent and the law of agency under 42 U.S.C. § 2000e-(b); and 3) in the interest of manifest justice during the pendency of *Faragher* and, if applicable, *Harrison*.

Dated: April __, 1998.

---

[1]On March 25, 1998, this Court also heard oral argument on *Gebser v. Lago Vista Independent School District*, 106 F.3d 1223 (5th Cir. 1997), a case involving the employer school board's liability for sexual harassment of a student by a teacher-supervisor. This Court's holding in *Gebser* may also be controlling in the instant case.

Respectfully submitted,

PATRICK J. GILPIN
Counsel of Record
PATRICK J. GILPIN &
ASSOCIATES
Attorneys for Petitioner
4001 North Shepherd, Suite 103
Houston, Texas 77018
(713) 691-6908

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JANUARY 8, 1998

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 97-20168
Summary Calendar

LINDA SLOAN,

Plaintiff-Appellant,

VERSUS

JOHN SHARP; ET AL,

Defendants,

JOHN SHARP, Comptroller, in his capacity as head of Comptroller of Public Accounts for the State of Texas; TEXAS, STATE OF; GRUNDY WILEY, Individually and in his capacity as an employee with the State of Texas; COMPTROLLER OF PUBLIC ACCOUNTS

Defendants-Appellees

Appeal from the United States District Court
For the Southern District of Texas
H-94-CV-622

Before DUHÉ, DeMOSS, and DENNIS, Circuit Judges.

Appendix A

DUHÉ, Circuit Judge:[1]

Appellant Linda Sloan, an employee in the Texas Comptroller's office, alleged that her supervisor, Appellee Grundy Wiley, began sexually harassing her in 1989 and that he continued to do so until she was fired in late 1995. Sloan filed a Title VII claim against the Comptroller alleging *quid pro quo* sexual harassment and a hostile work environment. Sloan alleged that the Comptroller was liable for Wiley's acts. The complaint also included a § 1983 claim against Wiley alleging violation of Sloan's Fourth, Fifth, and Fourteenth Amendment rights. The district court dismissed the § 1983 claim for failure to state a claim. The Title VII claim was tried to a jury, which found for the Comptroller. We affirm.

I

In 1980, Sloan began working for the Comptroller in Fort Worth and Arlington, Texas. In 1988, she transferred to the Southwest office in Houston. In 1989, Wiley became the manager at the Southwest office. Paul Eicke ("Eicke") and Fern Francis ("Francis,") worked as supervisors under Wiley and reported directly to him. Sloan reported either to Fern or Eicke.

Sloan alleges that once Wiley became the manager of the Southwest office, he began a pattern of sexual harassment that became progressively more intense. She testified to numerous events in the workplace, on the job away from the workplace and one occasion at her home of what she considered to be harassment by Wiley.

---

1. Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Sloan alleges also that Wiley tolerated her coworkers' harassment of her. Sloan testified that when she reported the incident to Wiley he told her that it "was a man's world and women have got to get used to this."

In another incident, another coworker touched Sloan in an inappropriate way. Sloan again alleges that she told Wiley about the touching and that he took no action.

Last, Sloan states that a third coworker made an inappropriate remark to her. Sloan reported the remark to Wiley, and Wiley told the coworker to apologize to Sloan. Sloan alleges that shortly after the apology, Wiley and the coworker went into Wiley's office and began laughing.

In a final incident with Wiley, Sloan alleges that she was waiting in line to get cake at another office birthday party when someone pinched her buttocks. When she turned around she saw Wiley taking his hand down and she threatened to slap him. Sloan testified that Wiley left the room, and she went across the hall to visit with a coworker. A few minutes later, Wiley bumped into Sloan while she was talking to the coworker in the hall. The parties dispute whether Sloan was knocked to the floor.

After this incident, Sloan contacted Judy Brittain ("Brittain"), the employee assistance liaison for the Comptroller's office. Brittain talked with Sloan at length over the phone. Brittain investigated Sloan's sexual harassment claim and found no sexual harassment.[2]

---

2. In addition to her telephone conversations with Sloan, Brittain also interviewed Wiley, Eicke, and Francis.

As a result of her complaint, Sloan was transferred to the Northwest office in Houston in 1993. There, she worked for only five days and never returned to work. Because all employees must be removed from the payroll after twelve months without leave, Sloan was fired in late 1995.

Sloan sued the Comptroller under Title VII claiming that the Comptroller was liable to her for *quid pro quo* sexual harassment and hostile work environment under the doctrine of vicarious liability and/or *respondeat superior*. She sued Wiley under 42 U.S.C. § 1983 for violating her Fourth Amendment right against unlawful search and seizure, her Fifth and Fourteenth Amendment right to due process, and her Fourteenth Amendment right to equal protection. Wiley successfully moved for dismissal under Rule 12(b)(6). Sloan's remaining claim against the Comptroller was submitted to the jury, and it found the Comptroller was not liable.

Sloan appeals arguing that the Rule 12(b)(6) dismissal was error and that the trial judge did not properly instruct the jury on the doctrines of vicarious liability and *respondeat superior*.

II

A. STANDARD OF REVIEW

A Rule 12(b)(6) motion is reviewed *de novo*. *Johnston v. City of Houston. Tex.*, 14 F.3d 1056, 1059 (5th Cir. 1994). Ruling on a Rule 12(b)(6) motion requires the court to accept the allegations as true and view them in the light most favorable to the non-mover drawing all reasonable inferences in that party's favor. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). The motion is denied unless it appears to a certainty that the plaintiff

can prove no set of facts that would entitle her to relief. *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992).

B. ANALYSIS

Wiley moved for a Rule 12(b)(6) dismissal on the grounds that Sloan could not seek relief under both Title VII and § 1983 because Sloan failed to show an independent basis for the § 1983 claim. Wiley relied primarily upon *Jackson v. City of Atlanta, Tex.*, 73 F.3d 60 (5th Cir.), *cert. denied*, 117 S. Ct. 70 (1996) which held that the same facts that support a Title VII claim cannot also support a separate § 1983 claim. The district court found that despite the fact that Sloan was given another opportunity to replead, she did not allege any conduct that supported her claim for a constitutional injury.[3]

The district court held that *Jackson* only reaffirmed the rule that a plaintiff may pursue claims under both Title VII and § 1983 if the predicate for the § 1983 is a right independent of one that Title VII creates. Moreover, the district court's analysis of the due process claim examines whether Sloan stated her claim with factual detail and particularity. Whether the claim arose from identical facts was not controlling.

The court found that Sloan did not allege any facts that could countenance a claim for a due process violation. When the court dismissed Sloan's third amended complaint, it stated that Sloan's repleaded complaint should state the specific conduct that resulted in damage to her bodily integrity and how

---

3. Sloan only briefs the Fourteenth Amendment due process claim; therefore we address only that claim. All issues not briefed are waived. *Villenueva v. CNA Ins. Co.*, 868 F.2d 684, 687 n.5 (5th Cir. 1989); *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994).

it amounted to a constitutional deprivation. The court also stated that the amended pleading must address Wiley's qualified immunity defense. Sloan's fourth amended complaint does not address any of these requirements. Sloan argues that she alleges she suffered a due process violation when Wiley bumped into her and touched her leg, but she does not explain how this amounts to a due process violation. Nor does her complaint address Wiley's qualified immunity defense. She argues that Wiley does not have a qualified immunity defense because the court denied his motion for summary judgment based on qualified immunity and he did not cross appeal. Thus, he waived his defense. The record cites that Sloan refers to do not show that Wiley's qualified immunity defense was denied, and thus he has not waived his defense. Therefore, under *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995), Sloan has not pled her claim with factual detail and particularity. *Id.* at 1430.

III

Sloan's second issue on appeal is that the court did not fully instruct the jury on *respondeat superior* and/or vicarious liability.

A. STANDARD OF REVIEW

We review a trial judge's jury instructions with deference because "it is the inescapable duty of the trial judge to instruct the jurors, fully and correctly, on the applicable law of the case, and to guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved." *Treadway v. Societe Anonyme Louis-Dreyfus*, 894 F.2d 161, 167 (5th Cir. 1990) (internal quotation marks omitted). We apply a two part test to evaluate objections to the failure to give a

a requested instruction. The objecting party must first show that the proposed instruction correctly states the law. If it does, then we determine if the given instruction was misleading. We reverse the judgment only if the charge as a whole leaves substantial and unremovable doubt as to whether the jury was properly guided in its deliberations. *Id.* at 167-68.

B. ANALYSIS

Sloan requested that the trial court's instruction to the jury on *respondeat superior* read:

> The Court instructs you that *respondeat superior* in the context of this case means that the State of Texas is absolutely responsible for the acts of a supervisor who has the power to make employment decisions concerning the employee's discipline, promotion, performance evaluations, or termination.
>
> The Court finds that Plaintiff was in a protected group and that the alleged harassment complained of was based on sex.

As for her claim of a sexually hostile work environment, Sloan asked that the jury instruction read:

> Sexually discriminatory verbal intimidation, ridicule and insult may be sufficiently severe or pervasive to alter the conditions of the victim's employment so as to create a sexually hostile work environment.
>
> Under the legal theory that Defendant State of Texas subjected Plaintiff to a sexually hostile work environment, the State of Texas is liable for the sexual harassment acts of its supervisors if the

supervisor was entrusted with the position of responsibility of supervising the employee.

The court's actual instructions explained the elements of *quid pro quo* sexual harassment and hostile work environment. Sloan argues that her proposed instructions fall within the two-part *Treadway* test. She argues that she meets the first part of the test because the requested instruction correctly stated the law. Sloan contends that because one of the elements of *quid pro quo* and hostile work environment harassment is whether a defendant knew or should have known of the sexual harassment, leaving out her instruction would misguide the jury. Sloan argues that Wiley and/or Eicke and Francis' alleged commission of sexual harassment satisfies the prima facie elements of notice. Therefore, without the requested instruction, the jury would not have known that no additional reporting to supervisors was necessary for there to be notice where Wiley, Eicke, or Francis either perpetrated or acquiesced in sexual harassment.

The Comptroller argues that even if Wiley sexually harassed or acquiesced in sexual harassment, the Comptroller is not strictly liable. Sloan's proposed instruction misstates the law. In *Patterson v. PHP Healthcare*, 90 F.3d 927, 943 (5th Cir.), *cert. denied*, 117 S. Ct. 767 (1996), we held that agency principles apply to Title VII when intentional wrongs are committed in furtherance of employment; however, the December 10, 1997 tortfeasing employee must think that he is doing the employer's business when committing the wrong. Sloan fails to explain how Wiley thought that he was doing the Comptroller's business when he was allegedly sexually harassing her.

As for Wiley's failure to report the coworker's actions and/or remarks, the jury heard testimony that Sloan reported only

one of the incidents to Eicke, Sloan's direct supervisor at the time, or to Wiley. Thus, there was sufficient evidence for the jury to believe that Wiley did not know of the incidents with the coworkers. Since Wiley did not fail to take action, then the Comptroller cannot be found liable.

AFFIRMED.

APPENDIX B — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION FILED NOVEMBER 21, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NO. H-94-622

LINDA SLOAN,

Plaintiff,

vs.

STATE OF TEXAS; COMPTROLLER OF PUBLIC ACCOUNTS FOR THE STATE OF TEXAS; and JOHN SHARP, IN HIS OFFICIAL CAPACITY AS COMPTROLLER, STATE OF TEXAS,

Defendants.

FINAL JUDGMENT

On the 13th day of November, 1996, the above-styled and numbered case came on for trial. Both sides appeared and announced ready for trial, and the case was tried to a jury, one having been timely requested, from November 13 to November 15, 1996. At the conclusion of Plaintiff's case in chief, Defendants moved for judgment as a matter of law as to Plaintiff's claims. Defendants' motion was denied. At the close of Defendants' evidence, both parties moved for judgment as a matter of law. Both motions were denied. Jury questions were submitted to the jury on Plaintiff's sexual harassment claims.

Appendix B

The jury questions and answers were as follows:

QUESTION 1

Do you find from a preponderance of the evidence that Defendants are liable to Plaintiff as to her *quid pro quo* sexual harassment claim? Answer "YES" or "NO."

ANSWER: NO.

Go to Question 2.

QUESTION 2

Do you find from a preponderance of the evidence that Defendants are liable to Plaintiff as to her hostile work environment sexual harassment claim? Answer "YES" or "NO."

ANSWER: NO.

If you answered "YES" to either Question 1 or Question 2, please go to Question 3. Otherwise, do not answer any further questions.

QUESTION 3

What sum of money, if any, do you find by a preponderance of the evidence should be awarded to Plaintiff as compensatory damages for Defendants' unlawful actions? Please answer in dollars and cents.

ANSWER: Not Answered.

Go to Question 4.

Appendix B

QUESTION 4

What sum of money, if any, do you find by a preponderance of the evidence should be awarded to Plaintiff as lost back pay, if any, that resulted from Defendants' unlawful actions? Please answer in dollars and cents.

ANSWER: Not Answered.

Based on the verdict, the Court ORDERS that Plaintiff take nothing from Defendants.

This Order is a FINAL JUDGMENT.

Signed this 21st day of November, 1996.

s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 12, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-20168

LINDA SLOAN

Plaintiff-Appellant

—

v.

JOHN SHARP; ET AL

Defendants

JOHN SHARP, Comptroller, in his capacity as head of Comptroller of Public Accounts for the State of Texas; TEXAS, STATE OF; GRUNDY WILEY, Individually and in his capacity as an employee with the State of Texas; COMPTROLLER OF PUBLIC ACCOUNTS

Defendants-Appellees

Appeal from the United States District
Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Appendix C

Before DUHÉ, DeMOSS, and DENNIS, Circuit Judges.

IT IS ORDERED that appellant's unopposed motion for leave to file petition for rehearing out of time is GRANTED.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

s/ John M. Duhé Jr.
JOHN M. DUHÉ, JR.
UNITED STATES CIRCUIT JUDGE

APPENDIX D — EXCERPTS FROM PARTIES' PROPOSED JURY INSTRUCTIONS IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION FILED NOVEMBER 12, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-94-0622

JURY REQUESTED

LINDA SLOAN,

Plaintiff,

STATE OF TEXAS; COMPTROLLER OF PUBLIC ACCOUNTS FOR THE STATE OF TEXAS; JOHN SHARP, IN HIS OFFICIAL CAPACITY AS COMPTROLLER, STATE OF TEXAS; and GRUNDY WILEY, INDIVIDUALLY,

Defendants.

THE PARTIES' PROPOSED JURY INSTRUCTIONS*

Under the Procedures Manual of the Honorable Judge Vanessa D. Gilmore, as required under paragraph 6B(l)a, the parties file Proposed Jury Instructions.

*Docket Entry 153.

Appendix D

AGREED INSTRUCTION NO. 3:*

* * *

**REQUESTED BY PLAINTIFF —
DISPUTED BY DEFENDANT**

The Court instructs you that respondeat superior in the context of this case means that the State of Texas is absolutely responsible for the acts of a supervisor who has the power to make employment decisions concerning the employee's discipline, promotion, performance evaluations, or termination.[2]

The Court finds that Plaintiff was in a protected group and that the alleged harassment complained of was based on sex.

*Appears in the Record under Docket Entry 153, pp. 10-11.

---

2. *Black's Law Dictionary; Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982), *Accord, Jones, supra.*, 722. See also, Larson, *Employment Discrimination*, Section 41.61; *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559 (11th Cir. 1987).

Appendix D

DISPUTED INSTRUCTION NO. 1:*

* * *

**REQUESTED BY PLAINTIFF —
DISPUTED BY DEFENDANT**

Sexually discriminatory verbal intimidation, ridicule and insult may be sufficiently severe or pervasive to alter the conditions of the victim's employment so as to create a sexually hostile work environment.[2]

Under the legal theory that Defendant State of Texas subjected Plaintiff to a sexually hostile work environment, the State of Texas is liable for the sexual harassment acts of its supervisors if the supervisor was entrusted with the position of responsibility of supervising the employee.[3]

*Appears in the Record under Docket Entry 153, pp. 17.

---

2. *Harris v. Forklift Sys., Inc.*, 510 U.S.____, 126 L.Ed.2d 295, 114 S.Ct. 367, 370-71.

3. *Hamilton v. Rodgers*, 791 F.2d 439, 444 (5th Cir. 1986); *Jett v. Dallas Indept. School District*, 798 F.2d 748, 762, fn. 13 (5th Cir. 1986); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943-944 (5th Cir. 1996).